Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-26

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney
of St. Joseph County, Indiana, *et al.*,

Petitioners,

v.

GLEN THEATRE, INC., *et al.*; and
DARLENE MILLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

LINLEY E. PEARSON
Attorney General of Indiana
WAYNE E. UHL*
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204
(317) 232-6333
Counsel for Petitioners

BRADLEY J. SHAFER*
LEE J. KLEIN
KLEIN & SHAFER, P.C.
4121 Okemos Road, Suite 20
Okemos, Michigan 48864
(517) 349-8666
Counsel for Respondents Glen Theatre, Inc., et al.

PATRICK LOUIS BAUDE*
929 South Jordan
Bloomington, Indiana 47401
(812) 855-5927

ROBERT C. ROSENFELD*
Assistant City Attorney
1400 County-City Building
South Bend, Indiana 46601
(219) 284-9241
Counsel for Respondents Civil City of South Bend, et al.

CHARLES A. ASHER
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
(219) 233-9341
Counsel for Respondents Darlene Miller, et al.

Counsel of Record

PETITION FOR CERTIORARI FILED JULY 2, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

Graphics LTD., Indianapolis, IN 46202

TABLE OF CONTENTS

Page:

Relevant Docket Entries:

Glen Theatre, Inc. *et al.* v. Civil City of South Bend, *et al.*, N.D. Ind. No. S 85-0353 iii

Darlene Miller, *et al.* v. Civil City of South Bend, *et al.*, N.D. Ind. No. S 85-00598 iv

Darlene Miller, *et al.* v. Civil City of South Bend, *et al.*, 7th Cir. Nos. 88-3006 & 88-3244 v

Glen Theatre Documents:

Complaint (6/14/85) 1

Stipulations of Fact for Hearing on Motion for Preliminary Injunction (7/1/85) 10

Affidavit of Gayle Ann Marie Sutro (7/8/85) 13

Affidavit of Roger Judd (7/8/85) 15

Affidavit of Timothy J. Corbett (7/15/85) 18

[Memorandum and Order of District Court Granting Preliminary Injunction (7/26/85) ..... Pet. App. 149]

[Order of District Court Granting Permanent Injunction (10/10/85) ..... Pet. App. 148]

[Decision of Seventh Circuit on First Appeal (*Glen Theatre v. Pearson*, 9/30/86) ..... Pet. App. 140]

Darlene Miller Documents:

Complaint (10/18/85) 20

Affidavit of Darlene Miller (10/18/85) 26

Affidavit of Arthur Ford (10/18/85) 28

Affidavit of Arthur Ford (3/1/88)..... 30

Videotape (Plaintiffs' Ex. 1, 3/1/88) ..... Supplement

Joint Documents:

[Memorandum and Order of District Court on Remand (9/9/86), as Supplemented by Memorandum and Order on Motion to Alter or Amend Judgment (10/21/88) ..... Pet. App. 120]

[Panel Decision of Seventh Circuit after Remand (10/19/89) ..... Pet. App. 112]

[Order of Seventh Circuit Vacating Panel Decision (1/8/90) ..... Pet. App. 110]

[*En Banc* Decision of Seventh Circuit (5/24/90)..... Pet. App. 1]

Judgment of Seventh Circuit (5/24/90)..... 31

RELEVANT DOCKET ENTRIES

DISTRICT COURT:

Glen Theatre, Inc., et al. v. Civil City of South Bend, et al., N.D. Ind. No. S 85-0353

Date	Proceedings
6/14/85	Comp fld. summs issd (4) fwd to Pltfs cnsl. flng fee pd. (Prelm Injunc complt)
	Mot for P/I
7/1/85	HRG. ON P.I. Ptys. file stips. of fact.
7/8/85	AFFIDAVITS of Gayle Sutro & Roger Judd
7/15/85	AFFIDAVIT of Timothy J. Corbett
7/26/85	MEMORANDUM & ORDER granting pltfs' mot. for prel. inj.; defts. enjoined until further order of the Ct. from enforcing I.C. §35-45-4-1(a)(3) by way of arrest, prosecution or otherwise, against any live nude or semi-nude entertainment at the Chippewa bookstore as performed by pltfs. Gayle Ann Marie Sutro and Carla Johnson. SHARP, J. [Pet. App. 149-158.]
10/10/85	ORDER that defts. are permanently enjoined from enforcing I.C. §35-45-4-1(a)(3) by way of arrest, prosecution or otherwise, againnst [sic] any live nude or semi-nude entertainment at the Chippewa Bookstore as performed by pltfs. Gayle Ann Marie Sutro and Carla Johnson. SHARP, J. EOD 10/11/85 [Pet. App. 148.]
10/11/85	JUDGMENT [on above]
11/12/85	NOTICE OF APPEAL by defts Michael Barnes and Linley Pearson.

2/3/86	ORDER referring case to Judge Miller for all further proceedings. SHARP, J.
9/30/86	[Seventh Circuit: Judgment of district court reversed and remanded for further proceedings.]
2/27/87	ORDER: J. Miller disquals. himself, refers to Ch. J for reassgnt. MILLER, J.
3/18/87	ORDER: J. Sharp accepts jurisd. SHARP, J.
7/15/88	HRG. ON MOTS. Matter under advisement. SHARP, J.
9/9/88	MEMO & ORDER granting judgment in favor of defts. [Pet. App. 120-136.]
9/13/88	JUDGMENT in favor of defts. (EOD 9/13/88)
9/28/88	MOTION of pltfs. to alter or amend
10/24/88	MEMO & ORDER denying pltfs' mot to alter or amend jdmt. The finding of mootness is vacated & jdmt shall apply in full to Glen Theatre & pltfs who perform there. (J. Sharp) (EOD 10/24/88). [Pet. App. 136-139.]
11/16/88	PLTFS' NTC OF APPEAL of memo & ord ent 10/21/88.

Darlene Miller, et al. v. Civil City of South Bend, et al.,
N.D. Ind. No. S 85-00598

Date	Proceedings
10/18/85	COMPLAINT.
	MOTION for prel inj by pltfs.
	AFFIDAVITS of Arthur Ford and Darlene Miller

5/5/86	MEMORANDUM & ORDER denying mots. for preliminary injunction. MILLER, J.
12/15/86	W/O Obj the Mot to Consolidate w/ Cause No. S85-722 [Sandy Diamond, et al. v. Civil City of South Bend, et al.] was GRANTED
2/27/87	ORDER: J. Miller disquals. himself, refers to Ch. J for reassgnt. MILLER, J
3/18/87	ORDER: J. Sharp accepts jurisd. SHARP, J.
3/1/88	AFF of Arthur Ford, w/ pltf exhb 1 (videotape).
9/9/88	MEMO & ORDER granting judgment in favor of defts. [Pet. App. 120-136.]
9/13/88	JUDGMENT in favor of defts. (EOD 9/13/88)
10/11/88	PLTF NTC OF APPEAL.

COURT OF APPEALS:

Date	Proceedings
10/14/88	Darlene Miller, et al. v. Civil City of South Bend, et al. docketed as No. 88-3006.
11/21/88	Glen Theatre, Inc., et al. v. Civil City of South Bend, et al. docketed as No. 88-3244.
12/22/88	ORDER: The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.
10/19/89	JUDGMENT (before Wood, Coffey, and Flaum, JJ.): Judgment of District Court reversed and remanded in accordance with opinion filed this date. [Pet. App. 112-119.]
11/2/89	State Appellees' (Pearson, Barnes, and Indiana Alcoholic Beverage Commission) Petition for

	Rehearing and Suggestion of Rehearing In Banc filed.
1/8/90	ORDER: Rehearing *en banc* granted; judgment and opinion entered 10/19/89 vacated. [Pet. App. 110-111.]
5/24/90	JUDGMENT: Judgment of District Court REVERSED, and the State is enjoined from enforcing its public indecency statute against these plaintiffs, in accordance with opinion filed this date. [See Pet. App. 1-109.]
5/30/89	Motion for Stay of Mandate (by appellees Pearson, Barnes, and Indiana Alcoholic Beverage Commission).
6/1/90	Motion for Stay of Mandate granted, mandate stayed to and including July 2, 1990 (per Flaum, J.).

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., an Indiana Corporation; GAYLE ANN MARIE SUTRO; and CARLA JOHNSON,	)	[Filed-stamped June 14, 1985]
Plaintiffs,	)	
vs.	)	CAUSE NUMBER S 85-0353
CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, CHIEF OF POLICE OF THE SOUTH BEND POLICE DEPARTMENT; MICHAEL P. BARNES, PROSECUTOR OF THE COUNTY OF ST. JOSEPH, INDIANA; and LINLEY PEARSON, ATTORNEY GENERAL OF THE STATE OF INDIANA,	)	
Defendants.	)	

COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT

Plaintiffs state their claims for relief as follows:

I.

JURISDICTION

1. This is a civil action whereby plaintiffs pray for preliminary and permanent injunctions enjoining the defendants from

enforcement of a certain statute (I.C. 35-45-4-1), commonly referred to as Indiana's public indecency law, of the State of Indiana, on the ground that it is unconstitutional as written and in its application and threatened application to plaintiffs in their activities described below. Further, plaintiffs pray for a declaratory judgment to determine the constitutionality of said statute of the State of Indiana, as written as applied and in its threatened application to them.

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions presented by 28 U.S.C. Section 1343(3), which provides in pertinent part that the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . .

and the organic law which further authorizes the institution of this suit founded on 42 U.S.C. Section 1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Prayer for declaratory relief is founded on Rule 57 of the Federal Rules of Civil Procedure as well as 28 U.S.C. Section 2201, which provides in pertinent part:

> . . . any Court of the United States upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . . .

The jurisdiction of the Court to grant injunctive relief and damages is conferred on the Court by 28 U.S.C. Section 2202, which provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

3. No other matter, civil or criminal, is pending in any state court involving any of the plaintiffs regarding the activities and events at issue here.

II.

PARTIES

4. Plaintiff Glen Theatre, Inc. is an Indiana corporation with its business located in Indiana. Plaintiff Glen Theatre, Inc. is primarily engaged in the sale of books and magazines and in the exhibition of live entertainment and motion picture films at a fully enclosed bookstore at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana. Plaintiff Glen Theatre, Inc.'s business premises are hereafter referred to as the Chippewa Drive-In. Plaintiff Glen Theatre, Inc. has offered and wishes to continue to offer to the interested adult public live stage productions in the form of nude and semi-nude entertainment.

5. Plaintiff Gayle Ann Marie Sutro is a professional actress, stunt woman, and ecdysiast who has danced, modeled, and acted professionally for a period in excess of 15 years. She has degrees from West Valley College in Saratoga, California (1975), San Jose State College (1978), the Los Gatos Academy of Dance, and the Marne Jones Modeling School in San Jose, California. She has studied acting, dance (including ballet, jazz, tap and exotic dance), and speech and languages. She speaks Spanish, Latin, and Italian. She is a current member in good standing of the Screen Actors Guild, the Screen Extras Guild, and Aftra. Plaintiff Sutro's theatrical and television

credits include performances as an actress and stunt woman in movies including Night Shift, Blues Brothers, and several adult films. Her acting and stunt woman work has included performances on several prime-time network television programs, including Love Boat, Magnum, P.I., the Fall Guy, McClain's Law, the Jefferson's [sic], Charlie's Angels, Hart to Hart, Flamingo Road, Fantasy Island, and Riptide. She has performed professionally in live theatrical productions and live stage shows in numerous theatres throughout the United States, has as an integral part of her dance removed her clothes and danced nude, has regularly engaged in live nude dancing as part of some of her performances and wishes to continue doing so free from criminal prosecution, has been scheduled, though her agent and plaintiff Glen Theatre, Inc. to make a personal appearance in conjunction with the area showing of one of her motion picture films at the Chippewa Drive-In, and has agreed to perform at the Chippewa Drive-In in South Bend, St. Joseph County, Indiana, her dance production at various times and dates throughout the summer and fall of 1985 commencing the week of July 15, 1985.

6. Plaintiff Carla Johnson is an entertainer who has performed on the stage of various theatres throughout the State of Indiana, including the stage at the Chippewa Drive-In, has engaged in live nude dancing as part of her performance, and wishes to continue the subject entertainment free from criminal prosecution.

7. None of the plaintiffs is the subject of a criminal charge pertaining to the issues herein.

8. Defendant Civil City of South Bend, Indiana, is a municipal corporation organized under the statutes of the State of Indiana and is located in St. Joseph County, Indiana.

9. Defendant Charles Hurley is named in his official capacity as Chief of Police of the South Bend Police Department, having the authority conferred upon him by the statutes of the State of Indiana and the ordinances of the City of South Bend to

supervise the operations of the South Bend Police Department.

10. Defendant Michael P. Barnes is named in his official capacity as Prosecutor of the County of St. Joseph, Indiana, having the prosecutorial authority conferred upon him by the statutes of the State of Indiana, which includes, among other things, the administration and implementation of the criminal statutes of the State of Indiana within St. Joseph County and the authority to determine which, and in what context, the criminal statutes are to be deemed violated and the authority to file informations initiating criminal proceedings within St. Joseph County.

11. Defendant Linley Pearson is named in his official capacity as Attorney General of the State of Indiana, having the authority conferred upon him by statute, custom, and usage to investigate alleged violations of the criminal and quasi-criminal statutes of the State and to act under color of authority of same.

12. The named defendants in their official capacities are joined to make enforceable to them and their agents, employees, and servants preliminary and permanent injunctions, a declaratory judgment, and other order of this Court.

III.

FACTUAL ALLEGATIONS

13. At times relevant hereto, the defendants and their agents, servants, employees, and others acting under their direction and control have acted and threatened to act under color of law to arrest and prosecute persons who entertained nude at the Chippewa Drive-In in alleged violation of I.C. 35-45-4-1.

14. I.C. 35-45-4-1 reads as follows:

> *I.C. 35-45-4-1. Public indecency.* (a) A person who knowingly or intentionally, in a public place:
> (1) Engages in sexual intercourse;

(2) Engages in deviate sexual conduct;
(3) Appears in a state of nudity; or
(4) Fondles the genitals of himself or another person; commits public indecency; a class A misdemeanor.
(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state. [I.C. 35-45-4-1, as added by Acts 1976, P.L. 148, Sec. 5, p. 718; 1977, P.L. 340, Sec. 76, p. 1533.]

15. Between 1983 and March 27, 1985, plaintiff Glen Theatre, Inc. operated the bookstore located at the Chippewa Drive-In at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana, and to the adult public press materials in the form of motion picture films, books, and magazines, and also live entertainment.

16. The subject live entertainment has included dance and entertainment performances with dancers and entertainers in part nude as that term is defined in I.C. 35-45-4-1.

17. Shortly after live entertainment commenced at the Chippewa Drive-In, the defendant Civil City of South Bend through the South Bend Police Department began arresting persons so performing, and defendant Michael P. Barnes and his agents began prosecuting such persons for alleged violations of the Indiana public indecency statute, I.C. 35-45-4-1.

18. Between March 29, 1983 and March 27, 1985, at least nine performers have been so arrested, and all who have been arrested have been prosecuted. At least five of those performers have been convicted of violating the subject statute and have unsuccessfully appealed their convictions to the Indiana Court of Appeals and the Indiana Supreme Court.

19. On March 27, 1985, the defendant Civil City of South Bend through the South Bend Police Department and its employees arrested two nude entertainers at the Chippewa

Drive-In; thereafter, those two entertainers were charged by defendant Michael P. Barnes and his agents with violating I.C. 35-45-4-1.

20. Defendant Civil City of South Bend through the South Bend Police Department and its employees have threatened as late as March 27, 1985 to continue such arrests and referrals to prosecution should nude entertainment continue at the Chippewa Drive-In.

21. Such arrests, prosecutions, and threats of arrests and prosecutions have forced plaintiffs Gayle Ann Marie Sutro and Carla Johnson, who have never been arrested but are fearful of being arrested in St. Joseph County, to forego what each of them believes to be the exercise of constitutionally protected rights under the First and Fourteenth Amendments to the Constitution of the United States in their performances and entertainment.

22. Such arrests, prosecutions, and threats of arrests and prosecutions have forced plaintiff Glen Theatre, Inc. to discontinue live nude entertainment as of March 27, 1985.

23. As a result of the arrests, prosecutions, and threats of arrests and prosecutions subjected against nude entertainers at the Chippewa Drive-In by defendants, plaintiff Gayle Ann Marie Sutro does not wish to risk arrest and prosecution by the exercise of her constitutional rights and the fulfillment of her entertainment commitments as undertaken for the summer and fall of 1985.

24. The defendants, their agents, servants, and employees have established a policy, custom, practice, and pattern to enforce the Indiana public indecency statute.

25. The Indiana public indecency statute, being I.C.35-45-4-1, is unconstitutional as written and as applied to live nude entertainment, being repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

26. The Indiana Supreme Court in *State v. Baysinger*, 397 N.E.2d 580 (Ind.1979) and *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984) has refused any narrowing judicial interpretation to answer the constitutional flaws of I.C. 35-45-4-1.

27. By reason of any continued conduct of the defendants in making arrests or initiating prosecutions for live nude entertainment at the Chippewa Drive-In, plaintiffs' rights under the First and Fourteenth Amendments to the Constitution would be violated to their irreparable harm for which plaintiffs have no adequate remedy at law. Immediate and irreparable injury, incalculable constitutional loss and damage to plaintiffs, and a chilling effect on the exercise of any member of the public's constitutional rights would result if an injunction is not issued forbidding defendants, their agents, servants, and employees from continuing in their described conduct.

WHEREFORE, plaintiffs pray that:

1. Defendants be required to forthwith answer the Complaint in conformance with the rules and practices of this Court.

2. A preliminary injunction issue from this Court upon hearing restraining the defendants and their agents, servants, and employees from further arrests or prosecutions or threats of arrests or prosecutions under I.C.35-45-4-1 in the factual context at bar, all pending a hearing and determination of plaintiffs' application for preliminary injunction and declaratory relief.

3. Upon final hearing a permanent injunction issue from this Court restraining the defendants and their agents, servants, and employees from further arrests or prosecutions or threats of arrests or prosecutions under I.C. 35-45-4-1 in the factual context at bar.

4. A declaratory judgment declaring I.C. 35-45-4-1 to be unconstitutional on its face, or in the alternative that this Court declare the application and threatened application in the afore-

mentioned statute to plaintiffs' described conduct to be unconstitutional.

5. Plaintiffs have such other relief as may be appropriate under the circumstances in this case together with costs and attorney fees pursuant to 42 U.S.C. Section 1988.

Respectfully submitted,

LYSOHIR, SINGER & ASHER

/s/ Charles A. Asher
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
Telephone: (219) 233-9341

Lee J. Klein*
8252 East Lansing Road
Suite 101
Durand, Michigan 48429
Telephone: (313) 365-2560
ATTORNEYS FOR PLAINTIFFS

*To be admitted *pro hac vice*.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC. et al.,	)	[Filed-stamped
	)	July 1, 1985.]
Plaintiff,	)	
	)	
vs.	)	CAUSE NUMBER
	)	S85-0353
	)	
CIVIL CITY OF SOUTH BEND, et al.,	)	
	)	
	)	
Defendants.	)	

STIPULATIONS OF FACT FOR HEARING ON MOTION FOR PRELIMINARY INJUNCTION

The parties through their counsel stipulate to the following facts in this cause:

1. Plaintiff Glen Theatre, Inc. is an Indiana corporation with its business located in Indiana. Plaintiff Glen Theatre, Inc. is primarily engaged in the sale of books and magazines and in the exhibition of live showings and motion picture films at a fully enclosed bookstore at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana. Plaintiff Glen Theatre, Inc.'s business premises are hereafter referred to as the Chippewa Bookstore. Plaintiff Glen Theatre, Inc. has offered and wishes to continue to offer to the interested adult public live nude and semi-nude showings.

2. None of the plaintiffs is the subject of a criminal charge pertaining to the issues in this case.

3. Defendant Civil City of South Bend is a municipal corporation organized under the statutes of the State of Indiana and is located in St. Joseph County, Indiana.

4. Defendant Charles Hurley is Chief of Police of the South Bend Police Department.

5. Defendant Michael P. Barnes is Prosecutor of the County of St. Joseph, Indiana.

6. Defendant Linley Pearson is the Attorney General of the State of Indiana.

7. This litigation concerns the constitutionality of I.C.35-45-4-1 which reads as follows:

> *I.C. 35-45-4-1. Public indecency.* (a) A person who knowingly or intentionally, in a public place:
>
> (1) Engages in sexual intercourse;
> (2) Engages in deviate sexual conduct;
> (3) Appears in a state of nudity; or
> (4) Fondles the genitals of himself or another person;
>
> commits public indecency; a class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state. [I.C. 35-45-4-1, as added by Acts 1976, P.L. 148, Sec. 5, p. 718; 1977, P.L. 340, Sec. 76, p. 1533.]

8. Between March 29, 1983 and March 27, 1985, at least eleven persons have been arrested for alleged violations of I.C.35-45-4-1 at the Chippewa Bookstore, and all who have been arrested have been prosecuted. At least five of these persons have been convicted of violating the subject statute and have unsuccessfully appealed their convictions to the Indiana Court of Appeals and the Indiana Supreme Court. (See Exhibits 1 through 15.) [Exhibits omitted from Joint Appendix.]

9. On March 27, 1985, the defendant Civil City of South Bend through the South Bend Police Department and its employees arrested two nude persons at the Chippewa Bookstore; thereafter, those two persons were charged by defendant Michael P. Barnes and his agents with violating I.C.35-45-4-1.

10. No viewing of the live activity at the Chippewa Bookstore is possible for any unconsenting or unknowing member of the public passing the building. The building rests approximately 1,000 feet from the nearest public access and is a building fully enclosed by solid opaque building materials.

LYSOHIR, SINGER & ASHER

/s/ Charles A. Asher
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
ATTORNEYS FOR PLAINTIFFS

OFFICE OF ATTORNEY GENERAL

/s/ William E. Daily
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204
ATTORNEYS FOR DEFENDANTS
LINLEY PEARSON AND
MICHAEL P. BARNES

OFFICE OF CITY ATTORNEY

/s/ Robert C. Rosenfeld
Assistant City Attorney
County-City Building
South Bend, Indiana 46601
ATTORNEYS FOR DEFENDANTS
CIVIL CITY OF SOUTH BEND
AND CHARLES HURLEY

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC. et al.,	)	[File-stamped
	)	July 8, 1985.]
Plaintiff,	)	
	)	
vs.	)	CAUSE NUMBER
	)	S85-0353
CIVIL CITY OF SOUTH BEND, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF GAYLE ANN MARIE SUTRO

Comes now Gayle Ann Marie Sutro and having been duly sworn does depose and say as follows:

1. I am one of the plaintiffs herein.

2. I am a professional actress, stunt woman, and ecdysiast who has danced, modeled, and acted professionally for a period in excess of 15 years.

3. I have degrees from West Valley College in Saratoga, California (1975), San Jose State College (1978), the Los Gatos Academy of Dance, and the Marne Jones Modeling School in San Jose, California.

4. I have studied acting, dance (including ballet, jazz, tap, and exotic dance), and speech and languages.

5. I am a current member in good standing of the Screen Actors Guild, the Screen Extras Guild, and AFTRA.

6. My theatrical and television credits include performances as an actress and stunt woman in movies including Night Shift, Blues Brothers, and several adult films.

7. My acting and stunt woman work has included performances on several prime-time network television programs, including Love Boat, Magnum, P.I., the Fall Guy, McClain's Law, the Jefferson's [sic], Charlie's Angels, Hart to Hart, Flamingo Road, Fantasy Island, and Riptide.

8. I have an extensive modeling career and have modeled for photographs in such magazines as Penthouse, Shape, Fitness, and New Body.

9. I have performed professionally in live theatrical productions and live stage shows in numerous theatres throughout the United States, and I have as an integral part of my dance removed my clothes and danced nude in an art form I consider to be artistic.

10. My nude dance performances are appropriately choreographed and are an attempt to communicate as well as to entertain.

11. I have scheduled, through my agent and plaintiff Glen Theatre, Inc., to make a personal appearance in conjunction with a South Bend area showing of one of my motion picture films at the Chippewa Drive-In.

12. I have agreed to perform at the Chippewa Drive-In in South Bend, St. Joseph County, Indiana, my dance production at various times and days throughout the summer and fall of 1985 commencing with the week of Judy 15, 1985.

Further affiant saith not.

/s/ Gayle Ann Marie Sutro

[Notarized July 8, 1985.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC. et al.,	)	[Filed-stamped
	)	July 1, 1985.]
Plaintiff,	)	
	)	
vs.	)	CAUSE NUMBER
	)	S85-0353
	)	
CIVIL CITY OF SOUTH BEND,	)	
et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF ROGER JUDD

Comes now Roger Judd and having been duly sworn does depose and say as follows:

1. I have been employed by Glen Theatre, Inc. for the last four years as the manager of the Chippewa Bookstore located at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana.

2. Glen Theatre, Inc. through the Chippewa Bookstore is in the business of supplying adult entertainment through written and printed materials, movie showings, and live entertainment.

3. The live entertainment at the Chippewa Bookstore, when it is available, is offered to fee-paying consenting adults over the age of 18 (with two pieces of identification as proof of age).

4. No alcoholic beverages are sold, consumed, or allowed on the Chippewa Bookstore premises.

5. The live entertainment at the Chippewa Bookstore consists of nude and semi-nude performances and showing of the female body through glass panels. No physical contact is allowed or possible between the performers and the customers. Some of the live entertainment that has been offered has taken place on a dance floor or stage which is surrounded by six so-called "mini-booths." Customers sit in these mini-booths, which contain exactly one chair for the customer to be seated. The customer has a door that he closes before watching the show, and this door can be locked at the customer's discretion. The customer then places quarters in a timing mechanism which, as a matter of electrical mechanics, causes the light in his booth to go off and the light on the stage to go on thus allowing the customer to watch live nude dancers for a period of time. A second form of live entertainment is also available at the Chippewa Bookstore, which consists of the following. These are performances commonly referred to as "private showings." They also take place in a mini-booth where the customer deposits quarters in a timing mechanism while he is seated in a small enclosed room with a door that can be locked. After depositing the requisite amount of money, he can view a nude entertainer through a glass panel that, again, allows no physical contact between entertainer and customer. In these private showings, the customer sees the performer alone, and there is a telephone through which he can speak to the performer.

6. The Chippewa Bookstore is located on private property at least 1,000 feet from the nearest public access road.

7. No accidental viewing by any non-consenting member of the public of any live nude entertainment is possible at the Chippewa Bookstore as it is constructed or as the live entertainment has been offered or would be offered.

8. The performers of the live nude entertainment are prohibited from making any dates with any customers, performing any obscene acts, or soliciting any illegal acts. To my knowledge, no person has been arrested at the Chippewa Bookstore

for any criminal act other than a violation of Indiana's public indecency law, I.C. 35-45-4-1, with the exception of one patron who was arrested for burglary.

9. Glen Theatre, Inc. does not permit any live or printed or filmed depictions of beastiality [sic], sado-masocism [sic], pedaphelia [sic], or any other acts that it does not believe represent non-obscene healthy interests in erotic materials.

10. Between March 29, 1983 and March 27, 1985, there have been approximately eleven arrests of individuals at the Chippewa Bookstore for one or the other kind of adult entertainment described above. The latest arrests occurred on March 27, 1985 against ladies by the name of Anita Bonds and Beverly Molnar.

11. As a result of the raids of March 27, 1985, the Chippewa Bookstore has been forced to discontinue the showing of any live nude entertainment. Glen Theatre, Inc. has been forced to discontinue any live entertainment at the Chippewa Bookstore due to the raids, arrests, and prosecutions of entertainers.

12. Glen Theatre, Inc. has scheduled the appearance of plaintiff Gayle Ann Marie Sutro beginning on July 15, 1985, which appearance and subsequent appearances can only take place if further raids and arrests and prosecutions do not take place.

Further affiant saith not.

/s/ Roger Judd

[Notarized July 8, 1985.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., AN INDIANA CORPORATION; GAYLE ANN MARIE SUTRO; AND CARLA JOHNSON,	)	[File-stamped July 15, 1985.]
Plaintiffs,	)	
vs.	)	CAUSE NO. S85-0353
CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, CHIEF OF POLICE OF THE SOUTH BEND POLICE DEPARTMENT; MICHAEL P. BARNES, PROSECUTOR OF THE COUNTY OF ST. JOSEPH, INDIANA; AND LINLEY PEARSON, ATTORNEY GENERAL OF THE STATE OF INDIANA,	)	
Defendants.	)	

AFFIDAVIT OF TIMOTHY J. CORBETT

Comes now Timothy J. Corbett, and being duly sworn upon his oath, states that:

1. He is a Sergeant with the Police Department of the City of South Bend.

2. He is aware of the policies, customs, and practices of the South Bend Police Department with regard to enforcement of the public indecency statute.

3. He is an officer in the South Sector, and all arrests at the Chippewa Bookstore have been made by Officers of the South Sector.

4. At the time nude activity began at the Chippewa Bookstore, officials of the South Bend Police Department conferred with the St. Joseph County Prosecutor's Office and South Bend City Attorney's Office before making any arrests.

5. No arrests have ever been made for nudity as part of a play or ballet.

6. He is a competent adult residing in St. Joseph County, Indiana.

7. He has first-hand knowledge of the matters contained herein and would testify to the same if present in court.

/s/ Timothy J. Corbett

[Notarized July 15, 1985.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation,	)	[File-stamped October 18, 1985.]
Plaintiffs,	)	
vs.	)	NO. S85-00598
CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLES HURLEY, CHIEF OF POLICE OF THE SOUTH BEND POLICE DEPARTMENT; MICHAEL P. BARNES, PROSECUTOR OF THE COUNTY OF ST. JOSEPH, INDIANA; and LINLEY PEARSON, ATTORNEY GENERAL OF THE STATE OF INDIANA,	)	
Defendants.	)	

COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND RELATED RELIEF

Plaintiffs state their claims for relief as follows:

I: JURISDICTION

1. This is a civil action whereby plaintiffs pray for preliminary and permanent injunctions enjoining the defendants from enforcement of certain statute (I.C.35-45-4-1), commonly

referred to as Indiana's public indecency law, of the State of Indiana, on the ground that it is unconstitutional as written and in its application and threatened application to plaintiffs in their activities described below.

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions presented by 28 U.S.C. Section 1343(3), which provides in pertinent part that the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . .

and the organic law which further authorizes the institution of this suit founded on 42 U.S.C. Section 1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The jurisdiction of the Court to grant injunctive relief and damages is conferred on the Court by 28 U.S.C. Section 2202, which provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

3. No other matter, civil or criminal, is pending in any state court or other federal court involving either of the plaintiffs regarding the activities at issue here.

II: PARTIES

4. Plaintiff Darlene Miller resides at 27150 Kline Trail, South Bend, St. Joseph County, Indiana, 46614.

5. Plaintiff JR's Kitty Kat Lounge, Inc. is an Indiana corporation owning and operating an establishment commonly known as the Kitty Kat Lounge, located at 1315 South Michigan Street, South Bend, St. Joseph County, Indiana, 46618.

6. Neither of the plaintiffs is the subject of a criminal charge pertaining to the issues herein.

7. Defendant Civil City of South Bend, Indiana, is a municipal corporation organized under the statutes of the State of Indiana and is located in St. Joseph County, Indiana.

8. Defendant Indiana Alcoholic Beverage Commission is created by Indiana statutes, being I.C.7.1-2-1-1 et seq., which uses, among other means, so-called "enforcement officers" as defined and described in I.C.7.1-1-3-16 and I.C.7.1-2-2-9.

9. Defendant Charles Hurley is named in his official capacity as Chief of Police of the South Bend Police Department, having the authority conferred upon him by the statutes of the State of Indiana and the ordinances of the City of South Bend to supervise the operations of the South Bend Police Department.

10. Defendant Michael P. Barnes is named in his official capacity as Prosecutor of the County of St. Joseph, Indiana, having the prosecutorial authority conferred upon him by the statutes of the State of Indiana, which includes, among other things, the administration and implementation of the criminal statutes of the State of Indiana within St. Joseph County and the authority to determine which, and in what context, the criminal statutes are to be deemed violated and the authority to file informations initiating criminal proceedings within St. Joseph County.

11. Defendant Linley Pearson is named in his official capacity as Attorney General of the State of Indiana, having the

authority conferred upon him by statute, custom, and usage to investigate alleged violations of the criminal and quasi-criminal statutes of the State and to act under color of authority of same.

12. The individual defendants in this case are named in their official capacities are joined to make enforceable to them and their agents, employees, and servants any injunctions or other orders of this Court.

III: FACTUAL ALLEGATIONS

13. Plaintiff Darlene Miller wishes to perform live nude and semi-nude entertainment at the Kitty Kat Lounge in South Bend, Indiana, and presently refrains from doing so because of specific threats from the South Bend Police Department that she would be arrested for an alleged violation of I.C.35-45-4-1 if she so performed.

14. Plaintiff JR's Kitty Kat Lounge, Inc. wishes to present live nude and semi-nude entertainment at the Kitty Kat Lounge but presently refrains from doing so because of specific threats of arrest of any such performers for alleged violations of I.C.35-45-4-1.

15. I.C.35-45-4-1 reads as follows:

> *I.C. 35-45-4-1. Public indecency.* (a) A person who knowingly or intentionally, in a public place:
> (1) Engages in sexual intercourse;
> (2) Engages in deviate sexual conduct;
> (3) Appears in a state of nudity; or
> (4) Fondles the genitals of himself or another person;
> commits public indecency; a class A misdemeanor.
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state. [I.C. 35-45-4-1, as added by Acts 1976, P.L. 148, Sec. 5, p. 718; 1977, P.L. 340, Sec. 76, p. 1533.]

16. On approximately July 27, 1985, plaintiffs attempted to present live nude and semi-nude entertainment at the Kitty Kat Lounge but terminated all such efforts when specifically advised by members of the South Bend Police Department that arrests pursuant to I.C.35-45-4-1 would follow.

17. The Indiana Supreme Court in *State v. Baysinger*, 397 N.E.2d 580 (Ind.1979) and *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984) has refused any narrowing judicial interpretation to answer the constitutional flaws of I.C. 35-45-4-1.

18. The Indiana Court of Appeals has recently refused any narrowing judicial interpretation to answer the constitutional flaws of I.C.35-45-4-1. See *Thompson v. State*, No.2-1084A327 (October 1, 1985).

19. By reason of any continued threats by the defendants to make arrests or initiate prosecutions for live nude and semi-nude entertainment at the Kitty Kat Lounge, plaintiffs' rights under the First and Fourteenth Amendments to the Constitution would be violated to their irreparable harm for which plaintiffs have no adequate remedy at law. Immediate and irreparable injury, incalculable constitutional loss and damage to plaintiffs, and a chilling effect on the exercise of any member of the public's constitutional rights would result if an injunction is not issued forbidding defendants, their agents, servants, and employees from making arrests or prosecutions against plaintiff Darlene Miller or any other entertainer at the Kitty Kat Lounge.

WHEREFORE, plaintiffs pray that:

1. Defendants be required to forthwith answer the Complaint in conformance with the rules and practices of this Court.

2. A preliminary injunction issue from this Court upon hearing restraining the defendants and their agents, servants, and employees from further arrests or prosecutions or threats of arrests or prosecutions under I.C.35-45-4-1 in the factual

context at bar, all pending a hearing and determination of plaintiffs' application for preliminary injunction.

3. Upon final hearing a permanent injunction issue from this Court restraining the defendants and their agents, servants, and employees from further arrests or prosecutions or threats of arrests or prosecutions under I.C. 35-45-4-1 in the factual context at bar.

4. Plaintiffs have such other relief as may be appropriate under the circumstances in this case together with costs and attorney fees pursuant to 42 U.S.C. Section 1988.

Respectfully submitted,
LYSOHIR, SINGER & ASHER

/s/ Charles A. Asher
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
Telephone: (219) 233-9341

ATTORNEYS FOR PLAINTIFFS

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation,	)	[File-stamped October 18, 1985.]
Plaintiffs,	)	
vs.	)	NO. S85-00598
CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLES HURLEY, CHIEF OF POLICE OF THE SOUTH BEND POLICE DEPARTMENT; MICHAEL P. BARNES, PROSECUTOR OF THE COUNTY OF ST. JOSEPH, INDIANA; and LINLEY PEARSON, ATTORNEY GENERAL OF THE STATE OF INDIANA,	)	
Defendants.	)	

AFFIDAVIT OF DARLENE MILLER

Comes now Darlene Miller, one of the plaintiffs herein, and states as follows under oath:

1. I am one of the plaintiffs in this case.

2. I make these assertions as a competent witness and based upon my personal knowledge.

3. I wish to engage in live nude and semi-nude entertain-

ment at the Kitty Kat Lounge in South Bend, St. Joseph County, Indiana.

4. I refrain from doing so solely because of the risk of arrest and prosecution for public indecency under I.C. 35-45-4-1.

5. On approximately July 27, 1985, members of the South Bend Police Department warned against any nude or semi-nude entertainment at the Kitty Kat Lounge, which I had attempted earlier that evening. The South Bend officers involved stated that arrests would follow from any such nude entertainment.

Further affiant saith not.

/s/ Darlene Miller

[Notarized on October 18, 1985.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation,	)	[File-stamped October 18, 1985.]
Plaintiffs,	)	
vs.	)	NO. S85-00598
CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLES HURLEY, CHIEF OF POLICE OF THE SOUTH BEND POLICE DEPARTMENT; MICHAEL P. BARNES, PROSECUTOR OF THE COUNTY OF ST. JOSEPH, INDIANA; and LINLEY PEARSON, ATTORNEY GENERAL OF THE STATE OF INDIANA,	)	
Defendants.	)	

AFFIDAVIT OF ARTHUR FORD

Comes now Arthur Ford and states as follows under oath:

1. I am president of JR's Kitty Kat Lounge, Inc., one of the plaintiffs in this case.

2. I make this affidavit based upon personal knowledge, and I would be a competent witness to the assertions herein.

3. Plaintiff JR's Kitty Kat Lounge, Inc. wishes to present

nonobscene live nude and semi-nude entertainment at the establishment commonly known as the Kitty Kat Lounge located at 1315 South Michigan Street, South Bend, St. Joseph County, Indiana, 46618.

4. The only reason that I, as the managing authority of that establishment, do not permit such entertainment is the threat of criminal prosecutions for public indecency under I.C.35-45-4-1.

5. On or about July 27, 1985, nonobscene live nude and semi-nude entertainment was provided at the Kitty Kat Lounge but was discontinued when members of the South Bend Police Department arrived and stated that arrests and prosecutions for violations of Indiana's public indecency statute would follow.

Further affiant saith not.

/s/ Arthur Ford

[Notarized on October 18, 1985.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DARLENE MILLER, et al.,	)	[File-stamped
	)	March 1, 1988.]
Plaintiffs,	)	
	)	
v.	)	CASE NO. S85-598
	)	
CIVIL CITY OF SOUTH BEND, et al.,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF ARTHUR FORD

1. My name is Arthur Ford.

2. I am the sole stockholder of JR's Kitty Kat Lounge, Inc.

3. I testified in this case on March 11, 1986, and I adopt and reaffirm that testimony here.

4. I have viewed plaintiffs' Exhibit 1, and the third and fourth of the four performances on that tape accurately depict the type of entertainment Darlene Miller and JR's Kitty Kat Lounge, Inc. wish to present to its consenting adult patrons.

Further affiant saith not.

/s/ Arthur Ford

[Notarized on February 26, 1988.]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: May 24, 1990

BEFORE:
Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Harlington Wood, Jr., Circuit Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable Richard A. Posner, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

No. 88-3006

DARLENE MILLER, et al.,

Plaintiffs-Appellants

v.

CIVIL CITY OF SOUTH BEND, et al.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 85 C 598, Judge Allen Sharp

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby,

REVERSED, with costs, and the State is enjoined from enforcing its public indecency statute against these plaintiffs, in accordance with the opinion of this Court filed this date.